

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Section 9	)	MD Docket No. 94-19
of the Communications Act	)	
	)	
Assessment and Collection of	)	
Regulatory Fees for the 1994	)	
Fiscal Year	)	

PETITION FOR RECONSIDERATION OF THE  
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")<sup>1</sup> respectfully submits this petition for reconsideration of the *Report and Order* in the above-captioned proceeding.<sup>2</sup> Specifically, CTIA requests the Commission to reconsider its decision not to amend Section 0.457 of its rules to include a provision that specifically grants confidential treatment to reports and regulatory fee

<sup>1</sup> CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry. CTIA previously filed comments in this proceeding.

<sup>2</sup> *In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, MM Docket No. 94-19, FCC 94-140, 59 Fed. Reg. 30,984 (June 16, 1994) ("Report and Order").

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computations based upon the number of subscribers served by cellular carriers and other commercial mobile radio service providers.

## **I. Introduction**

The Commission recently adopted rules and regulations to implement Section 9 of the Communications Act of 1934.<sup>3</sup> While the Commission adopted CTIA's proposal to establish December 31st as a uniform census date for reporting purposes, it denied CTIA's request to amend Section 0.457 of the Commission's rules to include a provision that will safeguard a common carrier's reports and regulatory fee computations from public disclosure. In denying CTIA's request, the Commission explained that "regulatees are required to submit very little data with their fee payments" and that it did not want to decide prematurely whether the disclosure of any information submitted, including the amount of fees calculated on a per subscriber basis, warrants confidential treatment under Section 0.457 of its rules.<sup>4</sup> The Commission stated that regulatory fee payments may be accompanied by requests for confidentiality pursuant to Section 0.459 of its rules.<sup>5</sup>

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<sup>3</sup> Section 9 authorizes the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services, and international activities. See 47 U.S.C. § 159.

<sup>4</sup> *Report and Order*, ¶ 110.

<sup>5</sup> *Id.*

Since wireless licensees' fee calculations are based exclusively upon a count of their subscribers, the annual reports necessarily include "financial information" that comes within the scope of exemption four of the Freedom of Information Act ("FOIA").<sup>6</sup> Accordingly, CTIA urges the Commission to reconsider its *Report and Order*, and grant confidential treatment to radio common carriers' fee calculations under Section 0.457 of the Commission's rules.

While the Commission's decision is based upon an analysis that focuses on the amount of information submitted, i.e., "small", this is not the appropriate standard for determining whether such information should be shielded from public disclosure. Furthermore, Section 0.459 does not provide adequate safeguards from public disclosure of the confidential financial information, i.e., the number of subscribers, that cellular licensees would be forced to reveal by reporting subscriber-based fee computations on a disaggregated basis. The Commission also has failed to address the presumption that files or databases that contain licensees' regulatory fee computations are to be routinely available for public inspection at the Reference Room of the Common Carrier Bureau's Industry Analysis Division.

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<sup>6</sup> 5 U.S.C. § 552(b)(4).

**II. Regulatory Fee Calculations Based on Subscriber Counts  
Are Confidential Financial Information That Must Be  
Shielded from Public Disclosure under Section 0.457.**

Section 0.457 (d)(i)-(iv) of the Commission's rules identify specific categories of financial reports that are not routinely available for public disclosure pursuant to exemption four of FOIA.<sup>7</sup> The Commission automatically shields such reports from public disclosures.<sup>8</sup>

Wireless carriers guard their market-specific subscriber counts as confidential financial data, and generally do not report such information on a disaggregated basis, unless they have adequate assurances that such information will be safeguarded from public disclosure.<sup>9</sup> In addition, the Commission should be very wary of making individual carriers' market-specific subscriber counts available for public

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<sup>7</sup> The categories of reports include financial reports submitted by broadcast licensees pursuant to Section 1.611 of the Commission's rules, including fees computed from information contained in financial reports submitted pursuant to Section 1.611; schedules 2, 3, and 4 of financial reports submitted for cable systems pursuant to Section 76.403; and annual fee computation forms submitted for cable systems pursuant to Section 76.406. See 47 C.F.R. §§ 0.457(d)(1)(i), (d)(1)(iii), and (d)(1)(iv) (1993).

<sup>8</sup> 47 C.F.R. § 0.457(d)(1)(1993).

<sup>9</sup> For example, CTIA's carrier members provide aggregated data for CTIA's semi-annual Data Survey. Neither CTIA nor its outside auditors who assemble the data are privy to the market specific information required by the Commission's new fee reports.

inspection since the release of this information can have anticompetitive effects.

CTIA has provided the Commission with an antitrust analysis that explains how certain factors and behavior can facilitate collusion by competitors.<sup>10</sup> The availability of accurate data concerning subscriber count within a specific market makes it easier for competitors to know how many subscribers are within a defined market and to gauge the effect of their marketing efforts within that market. This can dampen competition.<sup>11</sup>

Accordingly, CTIA petitions the Commission to reconsider its decision and to amend Section 0.457(d) to include a provision that specifically addresses confidential treatment of regulatory fee computations based on the subscriber count of wireless carriers.

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<sup>10</sup> See Besen et al., Charles River Associates, "An Antitrust Analysis of the Market for Mobile Telecommunications Services," submitted as Appendix A to CTIA Petition for Reconsideration, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, Gen. Docket No. 90-314 (December 8, 1993) ("Besen Antitrust Study").

<sup>11</sup> In the worst case, it can facilitate anticompetitive price structures. See *Besen Antitrust Study* at 52 (citing J.J. Rotemberg and G. Saloner, *A Supergame-Theoretic Model of Price Wars During Booms*, 76 *American Economic Review* 390-407 (1986)).

### III. The Commission Erred in Determining the Appropriate Safeguard Against Public Disclosure of Subscriber-Based Regulatory Fee Computations.

In the *Report and Order*, the Commission decided not to amend Section 0.457 of its rules to safeguard the confidentiality of data submitted with regulatory fees.<sup>12</sup> The Commission based its decision on an analysis that focuses on the amount of information submitted with the regulatory fees, i.e., "small", and its off-hand characterization that an amendment to Section 0.457 would be "premature" action to determine whether the disclosure of such information warrants confidential treatment.<sup>13</sup>

The Commission's analysis while simple, is simply wrong. The proper analysis is whether the information that the Commission is requiring carriers to report on their regulatory fee calculations is confidential financial information that comes within exemption four of FOIA, and not whether the amount of information to be disclosed is voluminous. As the U.S. Department of Justice explains, "The exemption ... protects those who are required to submit such commercial or financial information from the competitive disadvantages that could result from disclosure."<sup>14</sup> The U.S. Court of Appeals

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<sup>12</sup> *Report and Order*, ¶ 110.

<sup>13</sup> *Id.*

<sup>14</sup> Office of Information and Privacy, U.S. Department of Justice, *Freedom of Information Act Guide and Privacy Act Overview* 94 (September 1993).

has determined that the test for confidentiality of commercial or financial information is whether the disclosure of such information is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>15</sup> The test does not include an analysis concerning the amount of financial information that is submitted nor does it include an analysis as to when an agency should make a determination as to the appropriate time for providing an appropriate safeguard for public disclosure of such information.

#### **IV. Section 0.459 does not provide adequate safeguards from public disclosure**

Under the Commission's rules, an entity, e.g., a parent company, may submit a single check to cover the regulatory fees due for each of its wireless systems or licenses.<sup>16</sup> Although a single, aggregate payment is permissible, the Commission has clarified that the licensees must delineate certain data, such as the number of subscribers and their corresponding fee amounts, for each system or license rather than report this data on an aggregate basis.<sup>17</sup> Accordingly,

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<sup>15</sup> *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>16</sup> *Report and Order*, ¶¶ 53-55.

<sup>17</sup> FCC Regulatory Fee Seminar held June 14, 1994, Washington, D.C. See also FCC Public Notice, *Common Carrier Regulatory Fees* (June 20, 1994).

wireless carriers will be required to disclose confidential subscriber counts for each market without any assurances that such information would not be released under a FOIA request.<sup>18</sup>

Moreover, under Sections 0.451 and 0.453(i) of the rules, files containing reports required by the Commission's rules and regulations, e.g., wireless common carriers' regulatory fees reports, are presumed to be routinely available for public inspection at the Reference Room of the Common Carrier Bureau's Industry Analysis Division. This provision creates a legal presumption against confidentiality.

In the *Report and Order*, the Commission has not addressed whether such reports would be considered routinely available for public inspection. While the Commission has provided several public notices and has conducted a informational seminar on the payment of regulatory fees, the Commission has not provided any indication or assurances as to how it plans to handle petitions for confidentiality filed with regulatory fee payments. For example, what resources will be made available to handle the filing of a large number of petitions for confidential treatment, and for assuring the timely resolution of such petitions. Petitioners cannot assume that their confidential information is safeguarded from

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<sup>18</sup> Section 0.459 of the Commission's rules permits any person submitting information or material to the Commission to request that such information not be made routinely available for public inspection. 47 C.F.R. § 0.459 (1993).

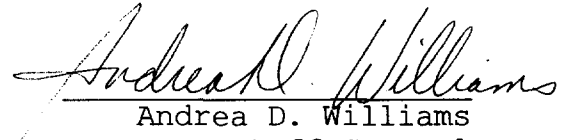


public disclosure until their individual petition for confidentiality is resolved. Before it requires wireless carriers to risk public disclosure of financially sensitive information, the Commission must address these concerns.

## **V. Conclusion**

For the foregoing reasons, CTIA urges the Commission to reconsider its decision not to amend Section 0.457 of its rules. CTIA maintains that wireless common carriers' regulatory fee computations include confidential financial information falling squarely within exemption 4 of FOIA, i.e., market specific subscriber data. In addition, Section 0.457 provides a more appropriate safeguard against public disclosure of such information than Section 0.459.

Respectfully submitted,

  
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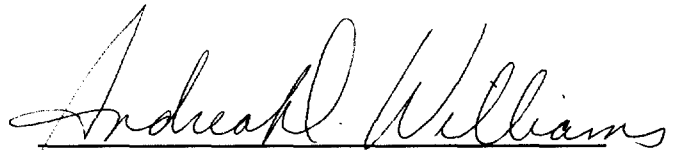
July 18, 1994

**CERTIFICATE OF SERVICE**

I, Andrea D. Williams, hereby certify that on this 18th day of July, 1994, copies of the foregoing Petition for Reconsideration of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

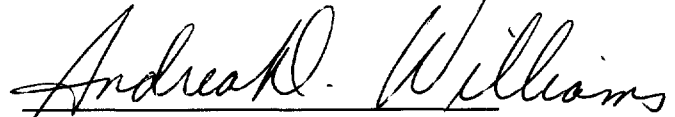
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I, Andrea D. Williams, hereby certify that on this 18th day of July, 1994, copies of the foregoing Petition for Reconsideration of the Cellular Telecommunications Industry Association were sent by U.S. mail, postage prepaid, to each of the parties listed on the following pages:

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